No. 10279

United States
Circuit Court of Appeals
For the Ninth Circuit

CUMMER-GRAHAM COMPANY, a Corporation, *Appellant,*

vs.

STRAIGHT SIDE BASKET CORPORATION, a Corporation, *Appellee.*

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division

HONORABLE CHARLES C. CAVANAH, *Judge*

RICHARDS & HAGA
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STATEMENT OF THE CASE

This action was commenced by appellee, hereinafter sometimes referred to as plaintiff, against appellant, hereinafter sometimes referred to as defendant, to recover a money judgment for royalties due plaintiff under a license contract for the manufacture of baskets, for handling, storing, and shipping vegetables and fruit, under patents held by plaintiff. Upwards of 200 carloads of such baskets of the value of about $200,000.00 (R. 179), are marketed annually in Idaho by defendant.

Plaintiff is a Michigan corporation and defendant a Texas corporation. The case presents two legal questions:

(a) Was defendant legally served with process in Idaho?

(b) Has defendant, by its activities in the State of Idaho, waived its right to object to the venue of the action?

The answer to both questions involves the nature and extent of defendant's activities in the state. Defendant refused to answer to the merits after its motion to quash the service and to dismiss the action had been overruled. The so-called answer (R. 33-36) to the amended complaint presented only the identical legal questions that the Court had previously decided against defendant on its motions to quash and dismiss. In the last paragraph of defendant's answer (R. 36) it said: *"Defendant refuses to answer any allegations of the amended complaint concerning the merits of the action and declines in any manner to plead to the merits."*

The motions had been presented on: (a) depositions taken by plaintiff at which defendant appeared and cross examined the witnesses, most of whom were defendant's officers and representatives, and (b) upon affidavits covering facts not covered by the depositions and the exhibits introduced in connection with the depositions.

Some of the exhibits have not been printed in full in the record (see defendant's designations of portions of record to be printed, R. 225-227). When defendant's designation was received by counsel for plaintiff, the exhibits had been sent to the Clerk of this Court and were not available for examination in Boise. Plaintiff, therefore, could not determine what additional portion of the exhibits should be printed. Plaintiff's designation (R. 227-229) calls attention to certain exhibits that should be printed and plaintiff reserved the

right to refer in its brief and on the oral argument to anything contained in the exhibits, material to its appeal, "even though not included in the printed record and to have such parts printed if required by the Court, in a supplemental record, at appellant's expense."

Summary Judgment: In view of the fact that defendant refused to plead to the merits and only presented in its answer the identical legal questions on which the Trial Court had ruled against defendant, there were no facts for determination by the Trial Court on the trial of the action, and plaintiff accordingly filed a motion for a summary judgment under Rule 56 (R. 37). The hearing on the motion was continued to September 1, 1942 (R. 41), at which time the summary judgment was entered (R. 42), defendant's counsel being present.

Attachment: An attachment was issued at the time of the commencement of the action and levy was made on 8,108 baskets of an aggregate value of $1,279.48, owned by defendant but in the possession of one of the distributors, and upwards of $8,000.00 due defendant from that distributor was garnisheed. The baskets and money were in *custodia legis* during all proceedings in the District Court.

Service on Responsible Agent: Service was made on C. H. Kinney, General Sales Agent for Appellant in a territory covering 26 states (R. 46). He was president of Veneer Products Company (R. 48), one of appellant's large subsidiaries or affiliated companies. He had charge of the marketing of substantially all of

appellant's baskets; and the marketing of baskets was appellant's principal business. Mr. Kinney held a responsible position and reported promptly the service of the papers to the proper parties.

Doing Business in Idaho: The selling of baskets in Idaho was an important part of appellant's business. C. H. Kinney spent annually about 60 days in Idaho selling and promoting the sale of the baskets (R. 52). At times he was assisted by the president and vice presidents of the company (R. 15, 164), and by his brother, A. V. Kinney. Mr. Kinney made collections and adjustments for appellant and generally handled its business in Idaho while in the State (R. 174-179). During the packing season appellant would send to Idaho what it calls "rollers" or "roller cars," loaded with baskets and consigned to itself, usually at Nampa, Idaho, and its salesmen would sell to Idaho customers these "rollers" while held at the Nampa yards and thus make quick delivery. Such cars were not sold until *after* they had been shipped from Texas, usually after they reached Idaho, and hence were not shipped or sold in interstate commerce, but appellant's business was substantially the same as if the baskets had been stored in a warehouse at Nampa and sold from there to growers and dealers in Idaho.

The Idaho dealers or so-called distributors were selling on *commission,* and if any of the "rollers" were not sold during the season, they were stored in Idaho for appellant until the following year and then sold at the price fixed by appellant (R. 124-141). The record shows a very substantial intra-state business, and that was the conclusion of the District Court.

BRIEF OF THE ARGUMENT

A.

Defendant Was Legally Served with Process in Idaho and the Court Did Not Err in Overruling the Motion to Quash the Summons and Service.

1. The activities of a foreign corporation which are sufficient to make it amenable to process within a state by service upon an officer or agent of the corporation may be less than those required to subject the corporation to the provisions of the state's licensing and taxation statutes.

Boise Flying Service vs. General Motors Acc. Corp., 55 Ida. 5, 36 Pac. (2d) 813.

Liquid Veneer Corp. vs. Smuckler, 9 Cir., 90 F. (2d) 196.

Denver & R.G. R. Co. vs. Roller, 9 Cir., 100 F. 738.

Bendix Home Appliances vs. Radio Accessories Co., 8 Cir., 129 F. (2d) 177.

2. A corporation is engaged in transacting business in a state if, in fact, in the ordinary and usual sense it transacts business therein of any substantial character.

Brown vs. Canadian Pac. Ry. Co., 25 F. Sup. 566.

Vilter Mfg. Co. vs. Rolaff, 8 Cir., 110 F. (2d) 491.

Tauza vs. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915, and cases cited under parag. 1.

3. A corporation is *present* in any state where its officers or agents transact business in its behalf by

authority of the corporation, and, when it appears that the corporation is engaged in transacting its corporate business in such a way as to manifest its presence within the state, process may be served on the officer or agent in charge of such business.

Steele vs. Western Union Telegraph Co., 206 N. Car. 220, 173 S.E. 583, 96 A.L.R. 361.

Reeves vs. So. Ry. Co., 121 Ga. 561, 49 S.E. 674, 70 L.R.A. 513.

State ex rel Taylor Laundry Co. vs. District Court, 102 Mont. 274, 57 Pac. (2d) 772, 113 A.L.R. 1, and cases cited under paragraphs 1 and 2.

4. A "managing or business agent," or "general agent," within the meaning of the Idaho statutes (Sec. 5-507, I.C.A.) or Rule 4(d)(3) of the Federal Rules of Civil Procedure, is any agent or officer whose position, rank, and duties make it reasonably certain that the corporation will be apprised of service made upon him.

Mas vs. Orange Crush Co., 4 Cir., 99 F. (2d) 675.

Boise Flying Service vs. General Motors Acc. Corp., 55 Ida. 5, 36 Pac. (2d) 813.

Bauer vs. Union Central L. Ins. Co., 22 N.D. 435, 133 N.W. 988.

Sanzone-Palmisano Co. vs. So. R. Co., 23 Ohio L. Rep. 162.

Halpern vs. Pa. Lbr. Industries, 244 N.Y.S. 372.

Beach vs. Kerr Turbine Co., 243 F. 706.

Nickerson vs. Warren City Tank & Boiler Co., 223 F. 843.

Johnson vs. Pac. Steel Boiler Corp., 230 N.Y.S., 441.

Jackson vs. Schuylkill Silk Mills, 156 N.Y.S. 219.

Swift vs. Matthews Engineering Co., 165 N.Y. S. 136.

Michigan Aluminum Foundry Co. vs. Aluminum Castings Co., 190 Fed. 879.

Toledo Computing Scale Co. vs. Computing Scale Co. (C.C.A. 6), 142 F. 919.

Harbich vs. Hamilton-Brown Shoe Co., 1 F. Supp. 63.

Clements vs. McFadden Publications, 28 F. Sup. 274.

Firestone Tire & Rubber Co. vs. Marlboro Cotton Mills, 278 F. 816.

5. It is not material that the officers of a corporation *deny that the agent was expressly given such power, or assert that it was withheld from him.* The question turns upon whether the agent is the corporation's representative in the state and whether his position is such that the law will imply that he will inform his superiors of the service made upon him; and, if he is that kind of agent, the service is valid, notwithstanding a denial of authority on the part of the other officers of the corporation.

Conn. Mutual Life Ins. Co. vs. Spratley, 172 U.S. 602, 43 L. Ed. 569.

Rendleman vs. Niagara Sprayer Co., 16 F. (2d) 122.

6. If a corporation is doing acts of business in a state sufficient to show an intent to make it an effective part of its field of operation in the business for which it was created, it is *present* in the state and it may be sued and served with process within the state.

Boise Flying Service vs. General Motors Acc. Corp., 55 Ida. 5, 36 Pac. (2d) 813.

7. It has long been settled by both state and federal courts that the fact that the business carried on by a corporation in a state is wholly *interstate* in character, does not render the corporation immune from the ordinary process of the courts within the state.

Can. Pac. Ry. Co. vs. Sullivan, 1 Cir., 126 F. (2d) 433.

International Harvester Co. vs. Kentucky, 234 U.S. 579, 58 L. Ed. 1479.

Boise Flying Service vs. General Motors Acc. Corp., 55 Ida. 5, 36 Pac. (2d) 813.

8. A foreign corporation may be sued on a transitory cause of action in any jurisdiction where it can be found and service obtained on an agent or officer.

Steele vs. Western Union Telegraph Co., 206 N.C. 220, 173 S.E. 583, 96 A.L.R. 361.

Reeves vs. So. Ry. Co., 121 Ga. 561, 49 S.E. 674, 70 L.R.A. 513.

Deatrick vs. State Life Ins. Co., 107 Va. 602, 59 S.E. 489.

Erving vs. C. & N.W. Ry. Co., 171 Minn. 87, 214 N.W. 12.

Lipe vs. Carolina C. & O. Ry. Co., 123 S.C. 515, 116 S.E. 101, 30 A.L.R. 248.

Vilter Mfg. Co. vs. Rolaff, 8 Cir., 110 F. (2d) 491.

C.J. 14-A, page 1383.

Annotations in 30 A.L.R. 255 and 96 A.L.R. 366.

9. There is no inhibition in the laws of Idaho against a non-resident suing a foreign corporation in the State of Idaho on a cause of action originating in another state. Such actions and attachments therein have been sustained by the Supreme Court of the State.

Jennings vs. Idaho Ry. L. & P. Co., 26 Ida. 703, 146 Pac. 101.

B.

The Defendant, by Its Activities in the State of Idaho, Has Waived Its Right to Object to the Venue of the Action.

10. Section 51 of the Judicial Code, Sec. 112, Title 28 U.S.C.A., accords to a defendant a personal privilege respecting the venue, or place of suit, which the defendant may assert or may waive at his election. The waiver may be by conduct instead of positive consent.

Neirbo Co. vs. Bethlehem Ship Building Corp., 308 U.S. 165, 84 L. Ed. 167, 128 A.L.R. 1437.

Okla. Packing Co. vs. Okla. Gas and Elec. Co., 309 U.S. 4, 84 L. Ed. 537.

Schwartz vs. Aircraft Silk Hosiery, 2 Cir., 110 F. (2d) 465, 31 F. Sup. 481.

Ward vs. Studebaker Sales Corp., 2 Cir., 113 F. (2d) 567.

11. To hold that a foreign corporation that has qualified under the laws of a state and subjected itself to the payment of license fees and taxes therein has waived its right to object to being sued in that state, and to hold that a foreign corporation doing business in defiance of the state's laws has not waived such rights, would amount to penalizing the law-abiding foreign corporation and placing a premium upon outlawry.

Lipe vs. Carolina C. & O. Ry. Co., 123 S. Car. 515, 116 S.E. 101, 30 A.L.R. 248.

ARGUMENT

Counsel for appellant state in their brief (p. 5) that the primary issues are whether the District Court correctly decided the question of venue and whether service was properly made upon defendant's sales manager. With that statement we agree. However, defendant's brief seems to question the propriety of the summary judgment. We shall first dispose of that point.

Defendant's motion to dismiss was made on November 17, 1941 (R. 6-7). It was supported by the affidavit of C. H. Kinney, the general sales manager

of defendant (R. 8-9). There was an answering affifavit filed on behalf of plaintiff (R. 10-14) and a further affidavit filed by Mr. Kinney on behalf of defendant (R. 14-18).

The motion to dismiss based on the three affidavits referred to came on for hearing on February 2, 1942. The minutes of the Court show (R. 18-19) that it was agreed that plaintiff should amend its complaint to include the matters set forth in the affidavit of Mr. Haga filed in its behalf "and that thereupon the defendant would withdraw the affidavit of C. H. Kinney filed on this date," all of which was approved by the Court, and it was ordered that the hearing be continued until after depositions had been taken on defendant's activities in the State of Idaho. Pursuant to the order and the agreement between counsel, an amended complaint was filed (R. 20-24) and depositions were taken in Paris, Texas, by *plaintiff* of C. H. Kinney, A. V. Kinney, and A. C. Mackin, officers and representatives of defendant. These witnesses appeared to testify with great reluctance as to any matter that would support plaintiff's case. They were cross examined by defendant's counsel, who, by very leading questions to friendly witnesses, placed the answers in their mouths. Their depositions are set out in the record (R. 44-99). Thereafter plaintiff took depositions in Idaho of Frederick C. Hogue, one of defendant's principal distributors and agents in Idaho; F. H. Hogue, who had for a long period handled defendant's baskets in Idaho, and being also a large grower; Scott Brubaker, employee of F. H. Hogue; J. C. Palumbo, a

packer and buyer of baskets from defendant, and of R. H. DeHaven, a general representative of plaintiff. The depositions taken in Idaho are set out in the record (R. 100-183).

After the depositions had been taken an affidavit was filed on behalf of plaintiff (R. 25-26) to connect certain facts touched on in the depositions. Thereupon the motions to quash and dismiss were again submitted. The Court rendered its opinion on April 15 (R. 26-32). A further hearing on defendant's motion to dismiss was set for May 7, 1942, and that motion was denied on that date (R. 33).

Under the rules of the Court, the motions to dismiss and to quash having been denied, defendant was required to answer within 10 days, and it filed its answer on May 16 (R. 33-36), raising again the identical questions that had been ruled upon by the Court and decided against defendant. Defendant expressly stated that it refused to answer to the merits (R. 36), and plaintiff thereupon filed a motion for a summary judgment under Rule 56, and that was obviously the procedure when defendant had refused to put any facts in issue.

We think no valid objection can be made either to the amendments to the complaint, which were made with defendant's consent, or to the summary judgment in view of the status of the case at the time it was entered.

The appeal, therefore, in our opinion, presents only the validity of the service of process and whether defendant has waived its right to object to the venue of the action.

Service was made by the United States Marshal on the defendant personally at Payette, Idaho, on October 30, 1941, by serving the necessary papers on C. H. Kinney (R. 6), who was at the time in Idaho on defendant's business and then was, and for a long time prior thereto had been, defendant's general sales manager for 26 states (R. 46).

Whether defendant was subject to service of process in Idaho and whether it waived its right to object to the suit against it in that state must be determined on the proof as to the activities of defendant in the state. Under all the authorities, a foreign corporation may be *present* in a state so that it may be legally served with process, without also doing business therein to the extent and of the kind that would make it necessary for it to qualify under the foreign corporation laws of the state and subject it to the payment of qualifying and license fees, and to taxation in the state, or to penalties for doing business without having first qualified as required by the state law.

In this case it seems impracticable to first consider the facts that are sufficient to validate the service and then the facts which the District Court held constituted a waiver of the right to object to the venue. We shall save time and avoid repetition by considering together the facts on both propositions. As nearly all of the witnesses were officers or representatives of defendant, it may be assumed that their testimony, where favorable to plaintiff, need not be discounted. We shall review briefly the testimony of the several witnesses:

REVIEW OF EVIDENCE

C. H. KINNEY, Sales Manager for defendant, resides at Paris, Texas, where defendant has its headquarters. He has been sales manager since November, 1938 (R. 45). He was in Idaho at the time he was served with process on business for defendant. His territory as sales manager covers twenty-six states. He describes his duties as follows, stated in narrative form (R. 45-78):

> "Traveling about twenty-six states, supervising sales, dealers—that is, wholesalers, and assisting in sales work, taking orders, looking after collections—anything that comes up in the handling and selling of merchandise * * * Cummer-Graham Company does an extensive business in Idaho. As Sales Manager I have charge of sales made in the State of Idaho, supervising them (R. 46). * * * At the time I was served with the summons in this case I was the only one in the State of Idaho connected with Cummer-Graham Company. Prior to October 30, 1941, A. V. Kinney, a salesman; J. A. McGill (president), J. C. DeShong (Vice-President and director), and Wallace Norton (a Vice-President and director), also represented defendant in Idaho at different times (R. 56, 47, 15, 164).
>
> "Veneer Products Company is a corporation. Its records are kept at the office of Cummer-Graham Company in Paris, Texas. I am president of Veneer Products Company. It does not directly sell any merchandise in the State of

Idaho. It sells all its products to Cummer-Graham Company. It keeps separate records in the Cummer-Graham Company's office (R. 48). I would estimate the number of carloads shipped by Cummer-Graham Company to Idaho from June, 1940, to June, 1941, at close to 200 cars (R. 49). In numerous instances Cummer-Graham is the consignor and also the consignee in bills of lading covering shipments to Idaho—it is necessary under what we call the 'roller system.' The diversion point is generally Nampa, Idaho. From time to time as those cars reach Nampa, Idaho, they are diverted to other parties or concerns in Idaho. I have authority to divert those cars for Cummer-Graham Company (R. 50-51). When diversions are made at a time when I am in Idaho I have authority to give the instructions for diversions. I sometimes spend more time (in Idaho) than others. Generally a week or ten days at a time and back two or three times in a season. I spend approximately a maximum of two months per year in Idaho."

"Q. Then while you are in Idaho, Mr. Kinney, state specifically just what you do for Cummer-Graham while you are out there.

"A. Oh, my! There are so many things pertaining to sales work, keeping customers sold on your product, specialty work helping your dealers increase their sales, looking after collections, seeing that your money comes in—everything connected with sales work, I would say.

"I call on lots of growers or owners of orchards (R. 52). I solicit business for the jobbers or independent dealers in Idaho—anything that will help promote sales (R. 53-54).

"Q. Now, while you are in Idaho, Mr. Kinney, do you make any collections from these jobbers or independent dealers?

"A. Well, there happen to be a class that if you don't make the collections you push them up to send the money in, because if you could, you would make the collection (R. 54)."

When asked with reference to the contract between Cummer-Graham Company and Reilly Atkinson Company, one of the defendants' distributors in Idaho, he testified (R. 65-67):

"Q. And do you have what you call a so-called consignment contract with the Reilly Atkinson Company?

"A. We handle it as such, I would say.

"Q. Do you have any kind of a written agreement with Reilly Atkinson Company?

"A. Well, we have one. I don't know how old it is but we have just carried it forward and extended it from year to year.

"Q. And would you, Mr. Kinney, for the purpose of this record, supply the stenographer with a copy of any agreement which Cummer-Graham Company might have with Reilly Atkinson Company?

"A. I couldn't so promise. I don't even know if I could find it.

"Q. If you could find the agreement with the Reilly Atkinson Company, would you furnish the stenographer, for the purpose of this record, and as Exhibit A to your testimony, a copy of said agreement?

"A. Yes."

(The agreement was not furnished.)

"Q. Now, on the other hand, do you make an effort to sell any of these products while you are there in Idaho?

"A. I make an effort to sell all our products. That is part of my job."

A. V. KINNEY (R. 79-83): He resides at Pittsburg, Texas. From November, 1938, until December 31, 1940, he was salesman for Cummer-Graham Company. As such he did work in the State of Idaho—"general sales work in connection with our dealers in Idaho and sales promotion work for promotion of Cummer-Graham products" (R. 79).

"I called on all shippers and anyone who might possibly use any of the products manufactured by Cummer-Graham. During that time I had an office in Idaho. It was in the Reilly Atkinson warehouse in Payette. I was there not over three months in any one year. Part of the business was transacted from that office" (R. 80).

A. C. MACKIN (R. 83-96): He is and has been since

1931 Secretary and Treasurer of the Cummer-Graham Company.

> "It depends upon the territory whether C. H. Kinney makes collections. We frequently direct him to do so. We have told him to contact our dealers in Idaho at various times and have them send us in some remittances" (R. 83-84).

Witness is also Secretary-Treasurer of Veneer Products Company (R. 90), of which C. H. Kinney is President (R. 48).

> "When the summons was served on C. H. Kinney on October 30, 1941, at Payette he was representing Cummer-Graham Company in his official capacity as Sales Manager and he was there on the time and expense of Cummer-Graham Company fulfilling the duties of his office (R. 95)."

FREDERICK C. HOGUE (R. 120-141, 155-159), commonly known as F. C. Hogue. Witness testifies that he is a merchandising broker doing business with the Cummer-Graham Company, selling packages, fruit packages. He says:

> "They ship me packages, and I sell them. Well, I sell these bushel baskets or half-bushel baskets and pea tubs, and they ship them up here, and I deliver them and invoice for them and collect for them (R. 102). * * * I keep a record of each car of packages."

The witness had an extremely limited knowledge as to how records were kept of his business with defend-

ant, except that he had a separate file for each car in which would be placed the letters, etc., relating to such car.

The witness then refers to his contracts with defendant, and said C. H. Kinney negotiated the contracts with him (R. 105).

The witness makes clear and states repeatedly that he operated on a commission basis (R. 107), his commission being 7 per cent of the sales price (R. 138), and presumably that explains why his books were not of the form customarily kept by merchants.

The witness explains (R. 113) that if he needs to fill an order quickly he will have roller cars "diverted" to him. Otherwise he might send an order to the Paris office and have the cars shipped after the order had been placed.

Questioned further with reference to the bookkeeping on roller cars which had been consigned to the defendant at Nampa, he said he would arrange with C. H. Kinney to take such roller cars (R. 114).

> "Q. Assume that the roller cars were in Idaho and you notified Mr. Kinney that you wanted one or more of those cars: When would they be invoiced to you?
>
> "A. Well, the first thing I would get would be the car number, and the contents, so I would know how to make my billing, and then that would be invoiced right after, direct from Texas, immediately upon receipt of the information they got.

"Q. Now, who would give them the information, you or Mr. Kinney, or both?

"A. Well, Mr. Kinney, probably if he was here.

"Q. He would give them the information, and then they would invoice you?

"A. Yes."

And again (R. 115):

"If I got hold of a car at Nampa, for example, it didn't belong to me until I had got the car and they had invoiced it to me."

"Q. And in order to get it, you would probably take up with Mr. Kinney, if he was here, the matter of taking over that car, and he would notify Paris, and they would invoice it to you, and you would pay for it after you received the invoice; is that correct?

"A. Yes."

Again he says on cross-examination (R. 118) that roller cars are sent out during the busiest part of the season for the purpose of taking care of the business of himself and Reilly Atkinson and any other salesmen who handle the Cummer-Graham products.

And again (R. 121) that roller cars are not invoiced to him until he informs Mr. Kinney that he wants the car.

"Q. In other words, there would be no invoice and no billing to you on those roller cars unless you diverted it or ordered the car.

"A. That's right.

"Q. So as to those roller cars, they were Cummer-Graham Company property until you directed Mr. Kinney or someone to divert it to you, or you ordered it, in which event it would be invoiced to you; is that right?

"A. That's right" (R. 122).

The witness gets no commission on any sales unless the sale is made by or through him—that if Mr. Kinney sells direct to other dealers or growers no commission is paid to the witness (R. 124).

The witness was then asked as to his answer to the Notice of Garnishment in which he stated that he had on hand upwards of 8,000 baskets belonging to the defendant. When asked how he obtained possession of those baskets he said (R. 124-25):

"Well, they were shipped to me."

"Q. Well, now, would they be carried over from one season to another?

"A. Well, yes, they could be.

"Q. Well, now, just explain how you would carry over baskets from one season to another for Cummer-Graham Company.

"A. Well, you see they shipped the merchandise to me on consignment, and so my picture in the thing is that I either have to have the money or the inventory, one of the two.

"Q. In other words, your contract is one whereby they ship the baskets to you on your order and you sell them on a commission, and you either

have to return the baskets or the money; is that true?

"A. Either have the baskets or the money; that's true.

"Q. In other words the baskets belong to them, if you do not sell them?

"A. Yes.

"Q. (R. 127). And then you store them for the winter for Cummer-Graham, and then when spring comes Cummer-Graham will put new prices on those baskets?

"A. Well, I am believing they will. They haven't yet.

"Q. And the price will fluctuate from year to year.

"A. Yes."

"Q. (R. 129). If the price changes, that does not affect you excepting that you can not sell them excepting at the new price; is that true?

"A. Yes.

"Q. And when you do sell them, the invoice to you means nothing—the old invoice means nothing, because you merely sell on a commission; is that true?

"A. Yes, I think that would be right.

"Q. (R. 132). When you don't sell them, do you advise them as to the inventory, or do they inquire of you as to the inventory?

"A. We tell them what we have that is unsold.

"Q. And what do they do, then, with respect to that inventory you send them?

"A. Well, that just goes back to the total amount of the shipments they have sent up here, should equal what we have on hand plus the cash we have sent them.

"Q. (R. 138). What does the commission amount to?

"A. Seven per cent.

"Q. Under your contract with Cummer-Graham the only compensation you receive for all your service is this seven per cent on the selling price less freight; isn't that true?

"A. Yes.

"Q. Regardless of what the selling price or invoice may be?

"A. Yes, I think that's right."

The witness was then questioned with reference to the selling price the next season for the baskets that were carried over and as to how he would ascertain the selling price for that year if it was not the same as the original invoice price, and as to that he said (R. 141):

"I would ask them what I am supposed to sell them for."

It is clear from the witness' testimony that he was a selling agent operating on a commission basis—that baskets were consigned to him for sale and that he was not expected to pay for them until they were sold. The selling price was subject to regulation by the defendant as owner of the baskets.

The witness (R. 156) identified a bill of lading of August 20, 1941, for a roller car which had been

diverted to the witness. It was introduced in evidence as plaintiff's Exhibit No. 5. This exhibit is an unqualified shipment to Cummer-Graham Company as consignee at Nampa, Idaho (R. 204). It is not in care of any of its distributors or local dealers. It clearly contradicts the testimony of defendant's representatives that such roller cars were shipped in care of its dealers in the state.

The witness was again asked to produce his contract with the defendant, but he claimed that he was unable to find it (R. 156). He promised to look further and to send it to the reporter who took the deposition (R. 156), but this he failed to do. The reporter states in his certificate (R. 184-185) that he called the witness Frederick C. Hogue on March 27, 1942, by long distance telephone to ascertain if he had found the contract, and the witness reported that he had been unable to find it. The contracts between defendant and its distributors or agents in Idaho could not be found, either by the officers of defendant or their agents when desired for examination or use in this case, and the parties to the contracts claimed only a very vague recollection as to the terms or provisions of the contracts.

F. H. HOGUE: Witness has been in the fruit packing and shipping business for upwards of twenty-five or thirty years at Payette. He produced a "Certificate of Retail Dealer" under the Robinson-Patman Act, plaintiff's Exhibit 2 (R. 193), which the defendant required in connection with the sale of their baskets.

Witness testified that on February 10, 1939, he gave

a mortgage to J. A. McGill, president of defendant, for $33,694.00; that he was not indebted to Mr. McGill personally for any amount whatsoever. The mortgage covered nine pieces of property in Payette County, being the same properties that in February, 1941, were conveyed to C. N. Kinney, father of C. H. Kinney, in trust for the creditors of F.H. Hogue. At the time the mortgage was given the witness was indebted in the amount stated to the *Basket Sales Company,* at one time a selling agency for defendant and other affiliated and independent basket manufacturers (R. 180).

The witness also testified (R. 146-147) that defendant's vice-president, Mr. De Shong, was the person who negotiated with the witness and arranged for the conveyance to C. N. Kinney of a substantial part of the property of the witness to be held in trust for his creditors, being the same property on which J. A. McGill, the defendant's president, had a mortgage, as stated above. About 40 per cent or more of the baskets sold by the Basket Sales Company were the property of defendant (R. 180).

Scott Brubaker: This witness testified that he is now trustee in place of C. N. Kinney, who died in December, 1941. The petition for the appointment of a successor trustee to C. N. Kinney (Exhibit 10) was signed by F. H. Hogue and approved by J. A. McGill, by C. H. Kinney, agent, and the latter gave much attention to these properties while held in trust for Hogue's creditors, and while C. H. Kinney was in Idaho at the expense and on the time of the defendant. The officers of defendant testified that the defendant had no interest in the property so held in trust and

was not a creditor of F. H. Hogue. Nevertheless, C. N. Kinney, in his official report as trustee in 1941 to the creditors of F. H. Hogue, stated that Cummer-Graham Company had advanced to him as trustee $7,000.00 during that year to be used for caring for and managing the trust property held by the trustee for the benefit of creditors (R. 25-26).

J. C. PALUMBO: This witness testifies (R. 159-163) that he purchased a roller car from A. V. Kinney in 1940. The deal was made at Payette and the car had been shipped about a week prior to the date the witness purchased the car. Plaintiff's Exhibit 6 includes a bill of lading which shows that the shipment was made to *defendant* as consignee at Nampa and not in care of any dealer. The original invoice was to defendant itself dated September 5, 1940. Attached is a letter from Mr. Palumbo addressed to A. V. Kinney at Payette, Idaho, enclosing check in payment for the car, dated September 23, 1940. There is also a letter from A. V. Kinney at Payette dated September 11 to Palumbo stating that he had diverted the car to Palumbo. This transaction took place at the time when A. V. Kinney, as sales manager for defendant, had an office at Payette, Idaho, for approximately three months.

F. H. DE HAVEN: He is a general representative of plaintiff. He is acquainted with all the officers of the defendant and its affiliated corporations. He names the officers of defendant and its affiliated companies (R. 164-67). A mere glance at the list of officers shows the intercorporate relations of a number of basket

manufacturers apparently dominated or controlled by defendant. Mr. McGill is president of defendant and C. H. Kinney is sales manager, but C. H. Kinney is president of Veneer Products Company and J. A. McGill is vice-president and A. C. Mackin is secretary and treasurer of both. A. V. Kinney (R. 167) is general manager of F. E. Prince Co.

Mr. De Haven had been intimately associated with all of these officers and representatives of defendant and the affiliated companies for many years because they were manufacturing baskets under licenses from plaintiff and it was part of Mr. DeHaven's business to keep in close touch with the sale of the baskets, as the royalty payments to plaintiff were based on the number of baskets sold. He testifies from an intimate knowledge of defendant's business and the manner in which the same was carried on through its various officers and representatives. These men had talked freely with Mr. De Haven regarding their business. He had met them and was associated with them in both Idaho and Texas. With reference to sales and collections made by C. H. Kinney and A. V. Kinney for defendant, he says (R. 168-169):

> "I have seen signed orders in their possession. I have also seen checks in their possession in payment of baskets which they have sold."

R. 170-71:

> "I have been present and have heard A. V. Kinney and C. H. Kinney both, for that matter, telephone the railroad companies and divert cars

which were consigned to the Cummer-Graham Company in some one place or another, usually in Nampa, Idaho. They would give instructions to the railroad clerk to divert a car, and describe the car by number and contents; and I have heard them subsequent to diverting the car telephone the customers and tell them that such car had been diverted and would be on track in such and such a place."

"I have seen invoices and bills of lading on cars that were shipped by Cummer-Graham Company into Idaho with the bill of lading reading, 'Consigned to Cummer-Graham Company, Nampa, Idaho'."

He stated (R. 172) that he knew that defendant has in recent years sold direct to growers in Idaho. He stated that the defendant under the license contract reported to plaintiff (R. 173) "every month on all sales made by their company in various states, and they report baskets delivered."

Sample reports were introduced in evidence as Exhibit 7 and are attached to the deposition.

When asked what he knew about the Kinneys making collections he said (R. 174):

"I saw a check in Arthur, or A. V., Kinney's possession; rather, he showed it to me, made payable to the Cummer-Graham Company by F. C. Marquardson, I believe, at Buhl, Idaho, in payment of baskets used in the year 1939. The amount of that check was $3,506.48."

When asked if the officers of defendant had ever made any statements with reference to ownership of Veneer Products Company, he said (R. 175):

> "I have heard general discussion about Veneer Products Company in which Mr. J. A. McGill was present, and in which Mr. C. H. Kinney was present, and myself, and other members of our firm. In that discussion it has been disclosed that C. H. Kinney, president of the Veneer Products Company, holds controlling interest of the Veneer Products Company and that he has accepted Cummer-Graham stock in payment of assets that Cummer-Graham has taken from the Veneer Products Company or acquired."

When asked if the two companies kept separate records, he said:

> "They do not keep separate records."

He then identified a report for the month of March, 1941, made to plaintiff by the defendant for itself and Veneer Products Company. It was introduced as plaintiff's Exhibit 8. He says further (R. 176):

> "May I state further that it had attached the check made payable to us in payment of license fees due for the sales shown on the report, and that the attached voucher is from a Cummer-Graham check in payment of those license fees for both the Veneer Products and Cummer-Graham, which is a customary practice."

He testified further (R. 176-7) that C. H. Kinney

negotiated contracts in Idaho with dealers; that he acted for defendant on most important matters. He says:

> "I have already stated that I saw him and heard him divert cars to customers and so advise the customers that he had done so. I saw him and heard him give instructions to his brother, A. V. Kinney, who was then a salesman for Cummer-Graham Company. I saw him do many things that I can't specifically describe at the moment, as being a representative in the territory of a firm that placed responsibility upon his shoulders."

The witness stated (R. 178-9) that more baskets manufactured under licenses issued from plaintiff were sold in the State of Idaho than in any other state by the defendant Cummer-Graham Company—that the number of baskets sold in Idaho aggregated approximately two hundred cars annually of an approximate gross value of $200,000.00. He testified also (R. 180) that the defendants sold through the Basket Sales Company at least 40 per cent of all the baskets sold by that company.

Counsel for appellant refer in their brief to the failure of appellee to put in evidence the contract or contracts between appellant and its Idaho distributors or agents. The simple answer to that criticism is that *appellant refused to produce the contract.*

That appellant was doing a very extensive business in Idaho is obvious from the evidence. On every basket sold in the state a royalty accrued to appellee. In no

other state did appellant sell such a large number of the baskets manufactured under its license from the appellee. In the State of Idaho appellant had property, and money due it from its agents or distributors. The baskets which it had stored with Frederick C. Hogue were attached (8,108 baskets of the value of $1,279.48) and upwards of $8,000.00 due it from Hogue was garnisheed when the action was commenced, and this property remained in *custodia legis* until after the summary judgment was entered.

There are numerous cases where the Court has held that the activities of a foreign corporation in a state have been sufficient to establish the corporation's presence in the state to support the service of process on its agent, but in none of the reported cases do we believe the activities of the corporation and the high rank of the agent measure up to the activities of appellant and the rank of its general sales manager on whom service was made in this case. He was not an ordinary employee. He was a man on whom great responsibility was placed. He was sales manager for 26 states and president of an important affiliated company, or subsidiary.

Appellant claims that the credits and orders had to be approved by the Board of Directors or officers at Paris, Texas. That is a strange contention if we accept their other contention that they had only *two distributors* in Idaho—Reilly Atkinson and Company at Boise and Frederick C. Hogue at Payette. They had been acting for the corporation for many years and their credit rating had been approved, presumably, once for all. The fact is, and the proof shows, that C. H. Kinney, and

from time to time other officers of defendant, spent much time in Idaho to develop a market for their baskets and make sales to growers; that in order to give quick service so as to compete with dealers that complied with the law and had their baskets on hand within the state, appellant resorted to the scheme of using the "roller cars" during the packing season when baskets would be required on short notice. When a grower needed baskets they would order one of these roller cars to be transferred from the Nampa railroad yard to the grower's siding. Such sales were obviously a purely intrastate matter, as much so as if it had been made out of a warehouse in Nampa. The baskets in the roller car at Nampa were the property of appellant. The baskets were in Idaho when the sale was made, and the contract of sale was made in Idaho, frequently by appellant's sales manager, who operated either from his office or his hotel room or from the office of one of the distributors.

It is significant that the distributors were paid on a commission basis and that the distributors' selling price was fixed from time to time by appellant. If these distributors were the *owners of the baskets* by direct purchase from appellant they would have fixed their own selling price. It is significant also that the "carry over" baskets from one season to another were baskets that had not been purchased by the distributors. They were baskets from the roller cars that were in Idaho at the close of the season. To save the expense of returning them to the factory they were stored in the warehouses of the distributors, but the price of the baskets for the next season was fixed by

appellant and these distributors were not required to pay for them until they were sold.

The contention that appellant was engaged purely in interstate commerce is obviously not sustained by the evidence. None of the roller cars were shipped on a *purchase order*. They were consigned to appellant in Idaho as much as if appellant had had a warehouse in which to store them when they reached that state. The shipment of the cars into Idaho was, of course, an interstate shipment, but defendant's business was not interstate commerce in the sense that the term "interstate commerce" is used in determining whether a corporation is "doing business" in a state. The claim of appellant that it charged the roller cars to its distributors and then made a counter-credit when the roller car was sold in Idaho to someone else is but a subterfuge resorted to in an attempt to evade the laws of Idaho relative to foreign corporations having to qualify before they can do business in the state and pay a license tax and be subjected to other taxes.

Defendant Was Legally Served with Process in Idaho

We deem it unnecessary to quote at length from authorities on the validity of the service of process on C. H. Kinney, Sales Manager for appellant. In paragraphs 1 to 9 of the "Brief of the Argument" many authorities have been cited. This Court has discussed the question in Liquid Veneer Corp. vs. Smuckler, 90 F. (2d) 196, and in Denver R.G. R. Co. vs. Roller, 100 F. 738. The Eighth Circuit in the very recent case of Bendix Home Appliances vs. Radio Accessories

Co., 129 F. (2d) 177 cited with approval the decision of this Court in the Liquid Veneer Corporation case. It said:

> "The activities of a foreign corporation which are sufficient to make it amenable to process within a state by service upon an officer of the state or upon the corporation may be less than those required to subject the corporation to the provisions of the state's licensing and taxation statutes."

A number of cases are cited in paragraph 4 of the Brief of the Argument showing the kind of activity and the limited authority of the agent that has been held sufficient to sustain the service of process.

In Beach vs. Kerr Turbine Co., 243 F. 706, a workman drawing $4.00 per day who was assisting in installing a turbine wheel was held to come within the term "managing agent" as used in the statutes of Ohio and service upon him was held valid.

Substantially to the same effect are the decisions in Nickerson vs. Warren City Tank & Boiler Co., 223 F. 843, and Rendleman vs. Niagara Sprayer Co., 16 F. (2d) 122. The annotations in 113 A.L.R. commencing on page 9 and extending to page 172 are an illuminating treatise on the subject.

The appellant was doing business in Idaho within the meaning of the foreign corporation laws of that state sufficient to require it to qualify under such laws and pay a license tax and appoint the statutory agent for service of process.

The evidence above referred to and other evidence

in the record and the exhibits introduced but not printed in full in the record show clearly that appellant was doing more business than simply carrying on interstate commerce. Its activities were obviously of an extent that required it to qualify as a foreign corporation.

The Supreme Court of Idaho in the case of Boise Flying Service vs. General Motors Acceptance Corporation, 55 Idaho 5, 16-17, 36 Pac. (2d) 813, construes the statutes on what constitutes "doing business" in the state. The Court says:

> "The respondent is a corporation; an artificial, and not a natural, person. Its presence in the state can only be manifested by its officers, agents, or representatives, through and by whom it must necessarily act in the transaction of its business.
>
> "Its course of conduct in purchasing paper in this state, and accepting payments on such paper in this state, and maintaining a representative in the state for that purpose, manifests the *presence* of respondent there, and constitutes the doing of business, sufficient to make it amenable to the process of the courts of this state.
>
> "'The presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from

the ordinary process of the courts of the state.' International Harvester Co. vs. Kentucky, 234 U.S. 579 (34 Sup. Ct. 944), 58 L. Ed. 1479, and cases therein cited. See also the recent case of Steele vs. Western Union Telegraph Co. (206 N.C. 220) 173 S.E. 583.

"In conclusion, we may state that there is one precise test of the nature or extent of the business that must be done in order to constitute 'doing business.' All that is requisite is that enough business be done to enable the Court to say that the corporation is present in the state; if a foreign corporation is doing acts of business in a state sufficient to show an intent to make it an effective part of its field of operation in the business for which it was created, such a corporation has subjected itself to the jurisdiction of that state. (18 Fletcher on Corporations, sec. 8713.)"

Appellant, by Its Activities in Idaho, Has Waived the Right to Object to Suit in the Federal Court for that State.

Defendant admits it has not complied with the laws of the State of Idaho relating to foreign corporations. It has not paid the qualification fee required under such laws nor the annual license tax, income or other taxes, or appointed a statutory agent on whom process may be served. The facts alleged in the amended complaint are admitted by the motions and supported by the evidence.

Defendant seeks all the trade advantages that may be had under the laws of the state, but claims that by

crafty maneuvers it has avoided subjecting itself to any of the burdens imposed on other foreign corporations that have complied with the law; that by the use of "roller cars" and fictitiously charging them on its books to its agents, who did not order them, it must be held that it is engaged only in interstate commerce.

Sec. 29-502, Idaho Code Annotated, 1932, provides that a foreign corporation must, in addition to filing certified copies of its Articles of Incorporation with the Secretary of State and County Recorder and paying the qualifying fees and annual license tax,

> "Must also within three months from the time of commencement to do business in this state, designate some person in the county in which the principal place of business of such corporation in the state is situated, upon whom process issued by authority of or under any law of this state may be served, and within the time aforesaid must file such designation for record in the office of the secretary of state, and file for record in the office of the county recorder of such county a copy of such designation, duly certified by such secretary of state, * * *
>
> "It is lawful to serve on such person so designated any process issued as aforesaid, and such service must be deemed a valid service thereof."

It will be noted that the Idaho statute does not limit the actions against such foreign corporations to either *citizens of the state* or to *causes of action that arise within the state* or arise from *business transacted in the state.*

In this respect it is different from the Montana statute which was considered by this Court in North Butte Mining Co. vs. Tripp, 128 F. (2d) 588. The Montana law provided that the corporation must file a certificate "certifying that said corporation * * * has consented to be sued in the courts of this state, *upon all causes of action arising against it in this state.*" Because of the provision of the statute this Court was compelled to hold that a suit could not be brought against a foreign corporation on a cause of action that arose in another state.

The Supreme Court of Idaho in Jennings vs. Idaho Ry. L. and P. Co., 26 Ida. 703, 146 Pac. 101, sustained a judgment in an attachment proceeding against a Maine corporation brought by a citizen of Pennsylvania on a note made in the City of New York, but payable in the City of Pittsburgh. We cite this merely to show that under the Idaho statutes the courts are open to citizens of other states on causes of action originating in other states against foreign corporations doing business in the State of Idaho. Authorities to the same effect under the laws of other states are cited in the Brief of the Argument (par. 8).

Appellant cites and relies upon a few of the older cases decided by the Supreme Court of the United States, including Old Wayne Life Assoc. vs. McDonough. These cases have lately been distinguished and qualified. They have no application to a state of facts such as we have in the case at bar and we deem it sufficient to refer to later decisions which have explained or pointed out the reasons why those decisions have no application here.

See Vilter Mfg. Co. vs. Rolaff (8 Cir.), 110 F. (2d) 491.

Brown vs. Canadian Pac. Ry. Co., 25 F. Sup. 566.

Lipe vs. Carolina C. & O. Co., 123 S. C. 515, 116 S.E. 101, 30 A.L.R. 248.

Under the broad rule lately established by the Supreme Court of the United States in Neirbo Co. vs. Bethlehem Shipbuilding Corp., 308 U.S. 165, 84 L. Ed. 167, 128 A.L.R. 1437, the law is now firmly settled that the objection to the *venue* of the action under Sec. 112, Title 28, U.S.C.A., may be waived by express consent or by failure to object. The rule established by that decision is familiar to this Court, and no extended argument on its application here seems necessary. Referring to the provisions of that statute the Supreme Court said:

> "Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. Commercial Casualty Ins. Co. vs. Consolidated Stone Co., supra. Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference. *The essence of the matter is that courts affix to conduct consequences as to place of suit consistent with the policy behind Sec. 51,* which is 'to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in

> any district, or wherever found.' (General Invest. Co. vs. Lake Shore & M.S.R. Co., supra; 260 U.S. at 275, 67 L. Ed. 254, 43 S. Ct. 106.)" (Our italics.)

There has been no modification of the decision in the Neirbo case, but it was approved and followed in Oklahoma Packing Co. vs. Oklahoma Gas & Elec. Co., 309 U.S. 4, 84 L. Ed. 537, and on many occasions it has been followed and applied by the district courts and the courts of appeal.

The Court says in the opinion in the Neirbo case that a foreign corporation by the appointment of a statutory agent for the service of process, waives its privilege under the venue statute, and it may waive it by other acts—it may waive it by entering a general appearance without raising the venue question; and it may waive it by *its conduct in other ways.* The Supreme Court said that "the essence of the matter is that *courts affix to conduct consequences as to place of suit*" * * *. (Our italics.)

When a corporation like defendant comes into a state and in violation of its laws is "doing business" in the state on a scale like the defendant has been doing in Idaho, it should not be heard to object that it has not by its conduct waived its right to be sued only in the state of its incorporation. Every order which it accepted for the sale of baskets was a contract; every representation that its salesmen made to purchasers might be the basis of an action against it. It would seem most illogical to argue that because it did not comply with the laws of the state, all actions against it on representations or agreements must be brought

in the State of Texas. We think by its conduct it has waived as completely its privilege under the venue statute as if it had consented to suit in the state by appointing a statutory agent.

Appellant apparently does not question that it comes under the rule in the Nierbo case if the Court should conclude that it is "doing business" in Idaho. Its contention is that it was not present in the State of Idaho and was not "doing business" therein of a character or to an extent or amount that would require it to qualify as a foreign corporation under the laws of that state. The sufficient answer to that is the decision of the Idaho Supreme Court in Boise Flying Service vs. General Motors Acc. Corp., 55 Ida. 5, 16-17, 36 Pac. (2d) 813.

We think it requires no argument that appellant could not, by an evasion or defiance of the laws of that state, obtain privileges and advantages in a Court that it could not have or enjoy if it had complied with the laws of the state.

The Supreme Court of South Carolina in Lipe vs. South Carolina C. & O. Ry. Co., 123 S. Car. 515, 116 S.E. 101, 30 A.L.R. 248, referring to this same matter, said:

> "To go further and hold that, because the foreign corporation, doing business in the state through agents amenable to process, has not complied with the state laws, and has not intended to subject itself to the jurisdiction of the state courts, it may not be held liable in the same manner and to the same extent as another foreign corporation legally doing similar business, *would amount to penalizing*

the law-abiding foreign corporation, and placing a premium upon outlawry." (Our italics.)

In our opinion the case was correctly decided by the District Court and the record contains no error. Wherefore, we respectfully submit that the judgment appealed from should be affirmed.

Respectfully submitted,

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